



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

P Wright, D McMenemy et al,
and F McGarry et al
Petitioners

v.

SEA/SEIU Local 1984 and
State of New Hampshire

Respondent

Consolidated Caption

*
*
*
*
*
*
*
*
*
*
*
*

Case No.s S-0433-1
S-0433-2
S-0434-1
S-0435-1

Decision No. 2007-037

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

As a preliminary matter, and as reflected in the caption, there are four cases which, with the agreement of the parties, are hereby consolidated for all purposes. The basis for the consolidation is discussed in greater detail later in this pre-hearing order. All parties shall utilize the above caption on all future pleadings and submissions.

These cases began with Philip Wright's filing of an unfair labor practice complaint on November 16, 2006. He claims he is unlawfully being charged an agency fee when he does not belong to a bargaining unit represented by the SEA/SEIU Local 1984 ("SEA") or, if he is in a bargaining unit represented by the SEA it is unlawful pursuant to RSA 273-A:8, II because he is a supervisor. In his complaint, Mr. Wright recounts his efforts to determine his "bargaining unit" status prior to the filing of his complaint. This involved communications between Mr. Wright and, among others, Karen Hutchins, Human Resource Administrator for the Department of Health & Human Service ("DHHS"), Sara Willingham, Manager of Employee Relations, and the SEA. Mr. Wright claims that the 2005-2007 Collective Bargaining Agreement "misleadingly lists a 'Supervisory Unit.' Such a unit does not exist. It is not listed on the NH SEA, SEIU Local 1984 website of 'Union Chapters'...[a]nd the unit has never been offered to the charging party as an option."

Mr. Wright asks that the PELRB forbid the collection of agency fees from him during the pendency of this action and permanently thereafter, require the removal of the supervisory unit

reference from the collective bargaining agreement as the unit does not exist nor is it lawful, and require a refund of all collected agency fees.

The SEA filed an Answer and Exceptions on December 1, 2006. The SEA claims: 1) that the complaint should be dismissed for failure to state a claim under RSA 273-A:5; 2) Mr. Wright lacks standing to bring the complaint; 3) Mr. Wright's complaint is, in substance, a modification proceeding which is improper because he lacks standing per Pub 302.05 (d) and is precluded from proceeding by the contract bar rule, Pub 301; 4) Mr. Wright has waived his arguments because he was a charging party in PELRB Case No. S-0411-2; 5) Mr. Wright's claims are barred by judicial estoppel, res judicata, collateral estoppel, and laches; 6) Mr. Wright seeks to remain a "free rider" who has accepted benefits of the collective bargaining agreement negotiated by the SEA without paying his fair share; 7) Mr. Wright has improperly delayed in bringing his complaint; and 8) The bargaining unit is grandfathered and accordingly dismissal is required.

On December 1, 2006 Mr. Wright filed a motion to amend which is the subject of an earlier decision. See PELRB Decision No. 2007-004. On January 5, 2007 Mr. Wright filed another amendment request seeking to add and remove certain individuals as parties. This request was allowed in part and denied in part, as stated in an earlier pre hearing order following a January 19, 2007 pre hearing conference. See PELRB Decision No. 2007-013.

Since that time three additional unfair labor practice charges have been filed, one by Mr. Wright on February 15, 2007 against the State of New Hampshire (S-0433-2), one by a group of 17 individuals from the Department of Health and Human Services on February 1, 2007 (S-0435-1), and a third by a group of 12 individuals from the Department of Environmental Services (S-0434-1). The SEA filed its Answer and Exceptions on February 15, 2007, and the State filed its Answers on February 16, 2007 and March 7, 2007, together with a Motion to Extend Time for Filing a Response.

A review of the complaints shows all have common themes related to claims that the petitioners are supervisors who accordingly should not pay an agency fee. The SEA has answered each of the complaints in the same way it responded to the original Wright complaint. The State's answers are also consistent with each other. The State essentially acknowledges the documents attached to the complaints but states many allegations are legal conclusions to which no responsive pleading is required or to the extent the allegations are factual the State lacks sufficient knowledge to answer and accordingly the allegations are neither admitted or denied or they are denied.

On February 8, 2007 the SEA filed a motion to dismiss in S-0433-1. The SEA contends that 1) Mr. Wright is a classified employee and is therefore represented by the SEA; 2) Mr. Wright's complaint that his inclusion in the bargaining unit is an improper practice is time barred; 3) Mr. Wright's attempt to convert the improper practice charge to a modification petition fails because only employee organizations, the public employer, or the current exclusive representative may file modification petitions and a modification petition is untimely in the present circumstances; 4) Mr. Wright has failed to state a cause of action upon which relief may be granted; and 5) Mr. Wright is a free rider. On February 16, 2007 Mr. Wright filed a detailed objection to the SEA's motion to dismiss, the specifics of which will not be restated here.

On March 1, 2007 Mr. Wright filed a Motion to Amend, which in substance is a request for consolidation of the four cases.

The undersigned-hearing officer conducted an informal pre-hearing conference on March 12, 2007 at the PELRB offices in Concord, New Hampshire.

PARTICIPATING REPRESENTATIVES AT PRE-HEARING CONFERENCE

For the Petitioners: Philip Wright, S-0433-1 and 0433-2
Dorothy McMenemy, S-0435-1
Frederick McGarry, S-0434-1

For the SEA: John Krupski, Esq.

For the State: Michael Brown, Esq.

ISSUES PRESENTED FOR BOARD REVIEW

Issues common to all the complaints are:

- 1) Whether the named employees are supervisors within the meaning of RSA 273- A:8, II;
- 2) What positions are included within the existing PELRB certifications for the New Hampshire Hospital, Decision No. 2002-012 and the Department of Environmental Services, Decision No. 2004-038;
- 3) What is the status or significance of the supervisors' unit referenced in the 2005-2007 Collective Bargaining Agreement Preamble;
- 4) Whether the SEA may represent both a supervisors' unit and a rank and file unit; and
- 5) Whether any of the bargaining units are "illegal" units because of non-compliance with applicable law, including provisions of RSA-273-A.

Issues common to all complaints against the SEA are:

- 6) Whether the SEA should prevail and/or the complaints fail and are barred for any of the reasons cited by the SEA in its further answer?

Issues specific to Mr. Wright's complaint are:

- 7) Whether the SEA should prevail and/or the complaint should fail and is barred for any of the reasons cited by the SEA in its motion to dismiss?

WITNESSES

For P. Wright, S-0433-1 and 0433-1:

1. Harold Searing
2. Winnona Vachnon
3. Jamie Ball

For F. McGarry, S-0434-1:

1. Paul Heirtzler
2. Gary Lynn
3. Gretchen Hamel
4. Michael Guilfooy
5. Frederick McGarry
6. Thomas Manning
7. Sarah Willingham
8. Gary Smith

For D. McMenemy, S-0435-1:

1. Marie A. Lang
2. Thomas F. Manning
3. Harold C. Searing
4. Winnona Vachnon

For State:

1. Thomas Manning
2. Lorri Hayes
3. Sara Willingham
4. Karen Hutchins
5. Pamela Sopskyk
6. Karen Levchuk

For SEA:

None listed on pre-hearing worksheet. At the pre-hearing the SEA did discuss witnesses in general, and specifically identified the following:

1. Dane Prescott

There are provisions elsewhere in this order concerning the SEA's submission of a complete written list of expected witnesses.

The hearing officer notes that all petitioners are considered to be likely witnesses in this matter as well. Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party.

EXHIBITS

For F. McGarry:

1. Organizational Chart DES Waste Management Division
2. Organizational Chart DES Commissioners Office
3. SJD, Administrator IV
4. SJD, Administrator III
5. SJD, Environmental Programs Administrator
6. 8-22-02 email, Thomas Manning to Robin Mongeon
7. 6-20-03 email, Sarah Willingham to Robin Mongeon
8. SJD, Attorney III
9. SJD, Sanitary Engineer III
10. Supreme Court Cases

For D. McMenemy and P. Wright:

Exhibits referenced and attached to complaint. At the pre-hearing conference Mr. Wright also added the following:

1. Appeal of Manchester Bd. of School Committee, 129 N.H. 151 (1987)
2. Appeal of East Derry Fire Precint, 137 N.H. 607 (1993)

For State:

1. Personnel files
2. Organizational charts
3. CBA
4. Complainants' exhibits

For SEA:

1. CBA
2. Organizational Structure of DHHS
3. Complete personnel file of all charging parties
4. Pleadings in Case S-0411-2
5. Complainants' exhibits

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

LENGTH OF HEARING

The time being set aside for this hearing is six (6) hours. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least twenty (20) days prior to the date of the evidentiary hearing.

DECISION

- 1) As to the SEA motion to dismiss, a review of the pleadings demonstrates a number of evidentiary issues which preclude a determination on the motion to dismiss in advance of the hearing. Accordingly, a ruling on the motion to dismiss is deferred to the hearing on the merits, and the arguments raised in the motion to dismiss will be considered and addressed along with the other issues raised by the parties in these matters at or upon the completion of the merits hearing.
- 2) It appears that a fair portion of the pertinent history can be stipulated by the parties. As stated at the pre-hearing conference, the parties shall endeavor to meet before March 31, 2007 for two hours to begin work on such a stipulation. In the event the parties are unable to meet by that date they shall schedule their meeting as soon thereafter as practical. The PERLB hearing room is available to the parties for the purpose of this meeting. The parties shall file a joint stipulation or, in the absence of a stipulation, a joint report within ten days of the completion of this meeting and also indicate whether they believe a further pre-hearing conference would be helpful.
- 3) Because of the issues involved in and raised by the pleadings to date, the SEA and the State shall meet and confer in order to prepare a joint list of positions within each of the departments involved in this case which they contend are included within and excluded from the bargaining units. If they are unable to come to agreement on such a joint list, then the SEA and the State shall each prepare and submit their own list. The joint submission or individual submissions shall indicate the basis for the inclusions and exclusions of positions. These materials shall be filed with the PELRB at least 45 days prior to hearing.
- 4) On or before April 15, 2007 the SEA shall file a short memorandum outlining the reasons why it requires the complete personnel file of all charging parties and shall include a discussion of the relevancy of these files and whether there are any confidentiality or privacy issues implicated by its request.

- 5) The State's motion for extension of time is granted without objection.
- 6) At the pre-hearing conference Mr. Wright's pending motion to consolidate was addressed. As all parties agreed at pre-hearing that these cases should be consolidated and it otherwise appears consolidation is appropriate it is so ordered. This consolidation order is without prejudice to any defense or claims of any party to this proceeding. As noted, the parties shall employ the consolidated caption contained in this order on all future submissions.
- 7) For the reasons stated in its pre-hearing worksheets, the SEA did not list witnesses, although counsel for the SEA did discuss likely witnesses and exhibits at the pre-hearing. The SEA shall file a supplement to all its pre-hearing worksheets on or before March 31, 2007 listing all its expected witnesses.
- 8) The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, to the opposing representative or counsel, and to the PELRB, at least thirty (30) days prior to the scheduled hearing date. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.
- 9) The parties shall file any additional preliminary, procedural or dispositive motions no later than thirty (30) calendar days prior to the scheduled hearing date.
- 10) For a variety of reasons discussed at the pre-hearing conference, the scheduling of a hearing in these matters is somewhat problematic, hence the delay in the hearing date provided herein. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on:

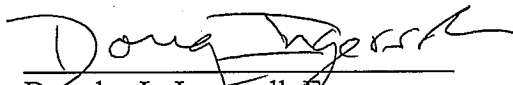
June 5, 2007 @ 9:30 a.m. and continuing on June 6, 2007 if necessary

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So Ordered.

March 22, 2007

John S. Krupski, Esq.
Philip Wright
Sara Willingham
Dorothy McMenemy
Frederick McGarry


Douglas L. Ingersoll, Esq.
Hearing Officer